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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Tek-Lite, Inc.--Request for Reconsideration

File: B-235306.2

Date: July 24, 1989

DIGEST

Dismissal of protest as untimely is affirmed on reconsideration where protester should have been aware of the legal basis for its contention that solicitation provision was improper, but did not protest until after initial closing date; protester may not await additional supporting information before filing protest.

DECISION

Tek-Lite, Inc., requests reconsideration of our April 28, 1988 dismissal of its protest as untimely under request for proposals (RFP) No. DLA-400-89-R-0696, issued by the Defense Logistics Agency (DLA) for penlight flashlights. We affirm the dismissal.

In its protest, Tek-Lite challenged the inclusion of clause M24 in the solicitation; that clause states that the government has accepted a value engineering change proposal (VECP), and provides that an evaluation factor equal to the royalty fee the government must pay to the developer of the VECP will be added to proposals offering a design based on the VECP. Tek-Lite alleged that the clause was unfair to Tek-Lite as the developer of the VECP and resulted in higher costs to the government. We dismissed the protest because it was first filed with the agency on March 9, approximately 2 months after the January 10 closing date for receipt of initial proposals; under our Bid Protest Regulations, a protest of solicitation provisions must be filed with the agency or our Office prior to the closing date in order to be timely. 4 C.F.R. § 21.2(a)(1) and (3) (1988).

In its request for reconsideration, Tek-Lite points out that it has protested the use of clause M24 to our Office in the

past without success, see, e.g., Tek-Lite, B-230298.5, June 28, 1988, 88-1 ¶ 612; Tek-Lite, Inc., B-227843.6, June 9, 1988, 88-1 CPD ¶ 546; Tek-Lite, Inc., B-227843.2, Oct. 2, 1987, 87-2 CPD ¶ 324; the firm states it therefore did not protest this solicitation prior to closing because it knew that any protest of the clause would again be denied. Tek-Lite explains that it protested only after learning of a report issued by the Department of Defense Inspector General (IG), issued on January 18, after the closing on this RFP, which it believes supports its position. Tek-Lite argues that therefore its protest should be considered timely because its position is supported by the information in the report, which was not available prior to closing.

Tek-lite's argument is without merit. As demonstrated by its prior protests, in which Tek-Lite has challenged clause M24 on several grounds, the firm was or should have been well aware of the legal basis for its protest, i.e., that Clause M24 is unfair to the VECP developer and not in the best interest of the government, prior to closing. At best, the IG's report only provided additional factual information that Tek-Lite believed supported its legal arguments. A firm must file a protest as soon as it is or should be aware of the protest basis; it may not wait until it obtains additional information pertaining to the protest before filing the protest. Sperry Corp., B-225492 et al., Mar. 25, 1987, 87-1 CPD ¶ 341, aff'd, Sperry Corp.--Reconsideration, B-225492.3, June 29, 1987, 87-1 CPD ¶ 638.

Contrary to Tek-Lite's position, the firm was not justified in withholding its protest to await the report on the basis that, without such supporting evidence, its protest would have been denied, as were the firm's prior protests concerning clause M24. In this regard, Tek-Lite's prior protests were denied, not because the record did not include an IG report containing factual information supporting Tek-Lite's position, but because the arguments Tek-Lite raised to challenge the clause in those cases were without legal merit.

For example, in Tek-Lite, Inc., B-227843.2, supra, Tek-Lite objected to the clause on the ground that it was unfair to add a VECP evaluation factor to the firm's bid of its own previously developed VECP item on a current procurement, since doing so would discourage Tek-Lite and other firms from developing VECPs in the future. We rejected Tek-Lite's position, not because of the lack of an IG report or similar information, but rather based on the legal conclusion that since a royalty payment to VECP developers is a cost to the government, an evaluation factor representing that cost

properly may be added to VECP bids, even bids from the VECP developer, in future procurements. Just as the presence or absence of a report expressing IG agreement with use of the factor would have had no effect on the legality of the clause there, the legal sufficiency of the clause here did not turn on the contents of an IG report, and could have been protested prior to the closing date.

In any case, it is not apparent, and Tek-Lite has not endeavored to explain, exactly how the IG report takes issue with, or is even relevant to, the agency's actions under the solicitation in question. The report expressly agrees with our prior decisions holding that as a general matter clause M24 is consistent with the Federal Acquisition Regulation (FAR) policy requiring agencies to provide financial incentives to encourage submission of VECPs, FAR § 48.102, and with other statutory and regulatory requirements. See Tek-Lite, Inc., B-230298.5, supra.

The report does cite a prior solicitation under which DLA applied an evaluation factor to the full quantity of VECP items offered by Tek-Lite even though no royalties would be payable for an initial quantity of the units (because the development costs paid to the developer of the VECP would be offset against the royalties otherwise payable), and expresses the view that this application of the M24 evaluation factor did not reflect the cost savings of Tek-Lite's proposal. However, DLA agreed, in response to a Tek-Lite protest on this ground (B-230298.3), to resolve this deficiency by applying the evaluation factor only to items on which royalties actually will be paid. Tek-Lite's current protest did not allege, and we thus have no reason to believe, that the agency did otherwise here.

The dismissal is affirmed.

for Seymour E. Hinchman
James F. Hinchman
General Counsel